RECENT CASES

BAILMENT—CARRIER—CHECKING PARCEL—Where a man checked a handbag at a parcel room in a railroad station, and received a check on the back of which in fine print was a provision that the depositor, in accepting said check, agreed not to hold the railroad liable for more than $10, to which his attention was not called, it was held that the railroad was liable as a warehouseman and that the plaintiff could recover the real value of the handbag, since he had no knowledge of the special contract of limitation of liability and hence did not assent to it. Healy v. R. R., 138 N. Y. Suppl. 287 (N. Y., 1912).

There appear to be but two American cases passing squarely upon the question of a carrier's liability for articles deposited in its check room. In Terry v. Southern Ry. Co., 62 S. E. Rep. 249 (S. C., 1908), on facts exactly similar to the principal case, except that nothing appeared as to the plaintiff's knowledge of or assent to the special contract of limitation, it was held that the railway was liable as a warehouseman and that the limitation of liability was valid. In that case the point was not raised as to whether plaintiff assented to and was bound by the limitation of liability. In Fraam v. G. R. & Q. Ry. Co., 161 Mich. 556 (1910) it was held that a carrier checking a parcel under facts similar to the principal case is liable as a warehouseman. In this case there appeared to be no contract limiting liability.

Where goods are left at a station to be kept for the owner either until he proceeds on his journey, or until he calls for them, without his paying for such service or without the goods being checked as baggage, then either the transaction is merely a personal one between the owner and the agent with whom the goods are left, or the company is merely a naked depository or gratuitous bailee; and in either case the company is liable only for gross negligence. Little Rock & Ft. S. R. Co. v. Hunter, 42 Ark. 200 (1883); Georgia R. & B. Co. v. Thompson, 86 Ga. 327 (1890); Van Gilder v. C. & N. W. R. Co., 44 Iowa 548 (1876); L. C. & L. R. Co. v. Mahan, 8 Bush 184 (Ky., 1871); Mattison v. N. Y. C. & H. R. Co., 57 N. Y. 552 (1874); Minor v. C. & N. W. Ry. Co., 19 Wis. 41 (1865).

In the following English cases a railroad company received articles, charging a small fee therefor, and issuing a check to be presented when the articles were called for, which contained conditions limiting the liability for loss to articles of certain value. The owner was held bound by the conditions wherever he should, as a reasonable man, have known of the presence of such conditions. Van Toll v. South Eastern R. Co., 6 L. T. N. S. 244 (1862); Pepper v. S. E. R. Co., 17 L. T. N. S. 469 (1868); Harris v. G. W. R. Co., 45 L. J. A. B. N. S. 729 (1876); Parker v. S. E. R. Co., 46 L. J. C. P. N. S. 768 (1876); Skipwith v. G. W. R. Co., 59 L. T. N. S. 520 (1888); Pratt v. S. E. R. Co., 66 L. J. Q. B. N. S. 418 (1897). The best discussion of the English law on the subject appears in Parker v. S. E. R. Co. *supra.*

BURGLARY—CONSENT TO CRIME—A person who had previously warned the railroad officials that a burglary would be committed that night, induced the defendant to break open a railroad warehouse at night and to take a bag of meat. It was held that, as the instigator was neither employed nor authorized by the railroad officials so to break and enter, the defendant was guilty. Mere knowledge of the proposed crime did not constitute consent thereto. Gentry v. State, 59 So. Rep. 853 (Miss., 1912).

Consent of the owner of premises entered is a good defense even if the defendant entered with felonious intent and without knowledge of the consent. State v. West, 157 Mo. 309 (1900). But knowledge without more is not consent. Eggington's Case, 2 East's P. C. 666 (Eng., 1801); People v. Hanselman, 76 Cal. 460 (1888); State v. Abley, 109 Iowa 61 (1899); State v. Jansen, 22 Kan. 498 (1879); State v. West, *supra;* State v. Sneff, 22 Neb. 481 (1887); State v.

Covington, 2 Bailey 569 (S. C., 1832). The owner is not bound to take measures for security; he may rely upon the law; passivity is not consent. Williams v. State, 55 Ga. 395 (1875); Thompson v. State, 18 Ind. 386 (1862).

Buf if the owner or his agent, acting as a decoy, suggest, instigate, induce, or procure defendant's entry, such entry being with the consent of the owner is not unlawful. Allen v. State, 40 Ala. 344 (1867); Love v. People, 160 Ill. 508 (1896); State v. McCord, 76 Mich. 200 (1889); State v. Waghalter, 76 S. W. Rep. 1028 (Mo., 1903); Strait v. State, 77 Miss. 693 (1900); Roberts v. Territory, 8 Okl. 326 (1899); Speiden v. State, 3 Tex. App. 156 (1877). But if an agent or servant of the owner instigate or procure the act without the authority of the owner, such procurement is not a defense, State v. Abley, *supra;* Thompson v. State, *supra;* unless the servant or agent had general authority to enter the building at the time. Reg. v. Johnson, 1 Carr. & Mar. 123 (Eng., 1841). If the plan was conceived by the defendant and carried out according to his directions, although with the knowledge of the owner or even with the active or apparent co-operation of the owner's agent or detective, there is no consent. Dalton v. State, 113 Ga. 1037 (1901); Comm. v. Nott, 135 Mass. 269 (1883); State v. Currie, 13 N. D. 655 (1905); Comm. v. Seybert, 4 Pa. Co. Ct. R. R. 152 (1887); McAdams v. State, 8 Lea 456 (Tenn., 1881).

CARRIERS—DAMAGES FOR DELAY—When no notice is given to a carrier that delay in transporting or returning goods delivered to its care will cause a suspension of the consignor's business and the carrier unnecessarily and inordinately does delay the carriage of the goods, the consignor is entitled to recover the loss directly and proximately resulting from the delay, but can not hold the carrier liable for possible earnings and profits which were lost by the enforced suspension of his business. Higgins v. U. S. Express Co., 85 At. Rep. 450 (N. J., 1912).

The court declared that this failure to give notice on the part of the consignor brought the case within the well-known rule established in Hadley v. Baxendale, 9 Ex. 341 (1854). The principle laid down in the leading case is that the damage recoverable from a carrier for delay is "such as might naturally arise from the breach of contract or such as might reasonably have been contemplated by both parties in making the contract as a probable result of a breach thereof." This doctrine has been universally adopted as correct in both the reports and text-books in England and America, but the cases are not in accord in the practical application of the rule. The weight of authority seems to hold that such damages must be capable of being accurately ascertained, and consequently contingent profits from possible sales cannot be recovered even though the carrier was informed that such was the object of the agreement. Harvey v. Conn. R. Co., 124 Mass. 421 (1878); Ward's etc. Co. v. Elkins, 34 Mich. 439 (1876); Penn. R. Co. v. Titusville etc. P. R. Co., 71 Pa. 35 (1872); Ward v. N. Y. C. R. Co., 47 N. Y. 29 (1873). The minority opinion, however, declares that the measure of damages may be enhanced to cover contingent profits where the carrier has notice and agrees to transport for a stated purpose or within a given time. Dening v. Grand Tr. Ry. Co., 48 N. H. 455 (1868); Priestly v. North Ind. etc. R. Co., 26 Ill. 205 (1861); Vicksburg etc. R. Co. v. Ragsdale, 46 Miss. 458 (1872); and Hutch. Carriers, sec. 772.

That the consignor can always recover for loss proximately caused by the delay is settled everywhere. Hale Carriers, 408; Hutch. Carriers, sec. 771. In addition to the actual difference in market value incidental damages caused by the delay can be recovered. Farwell v. Davis, 66 Barb. 73 (N. Y., 1873), time spent in searching for goods; Syre v. Ry. Co., 75 Wis. 215 (1890), time and labor spent in caring for goods. See also Lament v. Vaughn, 30 Vt. 90 (1858); and Black v. Baxendale, 1 Ex. 410 (1847).

CARRIERS—WRONGFUL DELIVERY—IDENTITY OF CONSIGNEE—Where a carrier delivers goods to one other than the consignee, without requiring any proof that he was connected with the consignee except letters produced by him addressed to the consignee, it is liable in conversion for the value of the goods so delivered, even though the person receiving the goods was the one who actually ordered them from the shipper. Southern Express Co. v. Ruth, 59 Southern Rep. 538 (Alabama, 1912).

A carrier is liable not only for the safety of the goods against all accidents, but he is also responsible for their proper delivery. Forward v. Pittard, 99 Eng. Rep. 953 (1785); Youl v. Harbottle, Peak's Cases at N. P. 50 (1791); Jewell v. R. R. Co., 55 N. H. 84 (1874); Goodwin v. R. R. Co., 58 Barb. 195 (N. Y., 1870); except in such instances as are attributable to the act of God or the public enemies. Duff v. Budd, 6 Moore 469 (1822).

Even circumstances of fraud, imposition or mistake, which cause the delivery to the wrong person, and have not been induced by the conduct of the owner of the goods, or in which he has not participated, will not relieve the carrier from liability for the value of the goods if they are thereby lost. American Express Co. v. Stock, 29 Ind. 27 (1867); Louisville R. R. Co. v. Ft. Wayne Electric Co., 21 Ky. L. Rep. 1544 (1900); Oskamp v. Southern Express Co., 61 Ohio 341 (1899); American Express Co. v. Fletcher, 25 Ind. 492 (1865); Southern Exp. Co. v. Van Meter, 17 Fla. 783 (1880); *Contra*, Urlson v. Adams Ex. Co., 43 Mo. App. 659 (1891); Express Co. v. Shearer, 160 Ill. 215 (1896).

The courts, however, draw a distinction, where the carrier, acting in good faith and with due diligence, delivers the goods to the person to whom they were consigned, though the consignor may have supposed the consignee to be another person or have been induced by fraud to direct the delivery of goods to such consignee. Samuel v. Cheney, 135 Mass. 278 (1883); Merchants' Despatch v. Transp. Co., 135 Mass. 283 (1883); The Drew, 15 Fed. 826 (1883). In such instances the carrier is not responsible for the loss of the property. This distinction is close, but supportable on the ground that the carrier has done all that he contracted to do, namely, deliver the property to whomever it was consigned.

The question depends upon whether the person who wrote the order acquired a right which placed him as to the carrier in the position of the consignee. If he was, then a delivery to him discharged the carrier. McKean v. McIvor, L. R. 6 Exch. 36 (1870). But if the consignor does not intend that the goods should be delivered to the writer of the order, but to the firm to which they were directed, then the former is not the consignee and the carrier delivers at his peril. Price v. R. R. Co., 50 N. Y. 213 (1872); American Exp. Co. v. Fletcher, 25 Ind. 492 (1815); Winslow v. R. R., 42 Vt. 700 (1870).

CONTRACTS—INVALIDITY—PROCURING EVIDENCE—PUBLIC POLICY—A contract was made employing private detectives to enter a factory as employes and procure evidence of larceny, compensation to depend upon the apprehension of guilty persons. It was held that the contract was void, for its tendency to induce the making of charges in order that the detectives might earn their compensation. Mfr's Bureau v. Everwear Co., 138 N. W. Rep. 624 (Wis., 1912).

Whether or not a contract of employment is void as against public policy is determined by the effect of the services contracted for; and the fact that the parties had contracted in good faith will not of itself validate a void contract. Delbridge v. Beach, 66 Wash. 416 (1912).

Whereas, an agreement to disclose information is not necessarily invalid, a contract to procure evidence to a *particular* effect or witnesses to prove a certain *particular* point in issue in court is ordinarily held invalid as being contrary to public policy. It is an inducement to commit fraud or procure persons to commit perjury. Hughes v. Mullins, 36 Mont. 267 (1907); Lyon v. Hussey, 82 Hun. 15 (N. Y., 1894). Accordingly, an agreement to furnish testimony favorable to a party to a suit, for a consideration dependent upon the result, is void. Bowling v. Blum, 92 Texas 133 (1899); Getchell v. Welday, 4 Ohio 113 (1895); Neece v. Joseph, 95 Ark. 552 (1910). But an agreement by a third person with one party to an action to procure from the other party a contract of such a character that it would of itself constitute the evidence desired by the former is not invalid. It was so held where a contract was procured to prove that one of the parties to a contract was violating it by selling machines below contract price. March Co. v. Fisher, 144 Iowa 45 (1909).

CONTRACTS—REVOCATION BY WIRE—PLACE OF BREACH—Defendant, a foreign corporation, had agreed to accept delivery of goods in Buenos Ayres, under a contract with the plaintiff. In anticipation of the actual delivery,

defendant sent a cablegram from New York to the plaintiff at Buenos Ayres, repudiating the contract. It was held this brought it within Sec. 1780, subdiv. 3, of the N. Y. Code Civ. Pro., authorizing suits by a non-resident against a foreign corporation when the *breach of a contract* occured *within the state.* Wester v. Casein Co. of America, 100 N. E. Rep. 488 (N. Y., 1912), reversing the Supreme Court decision in 140 N. Y. App. Div. 442.

In order to reach their conclusion the court were forced to make an unwarranted extension of Adams v. Lindsell, 1 Barn. & Ald. 681 (1818), holding that "the delivery of the cablegram to the telegraph company should be treated as delivery to the plaintiffs" in the Argentine, and, therefore, the breach occurred in New York City. For this proposition the court cited Vassar v. Camp, 11 N. Y. 441 (1854); Nevin v. Wood, 36 N. Y. 307 (1867); but both of these were cases of *offer* by mail and *acceptance* by mail, and not, as in the principal case, mere repudiation of an existing contract.

The principal case seems *contra* to several former decisions. In Crown Point Iron Co. v. Boatman Fire Ins. Co., 127 N. Y. 608 (1891), it was held that when a request to cancel insurance is sent by mail, the cancellation is still incomplete and the policy remains in full force until the letter *reaches* the insurer. Peabody v. Satterlee, 166 N. Y. 176 (1901), held that deposit of a letter of proof was not notice of proof, but only so when letter was *received.* Fink v. Fink, 171 N. Y. 616 (1902), held that the deposit of a letter giving notice of a change was not notification until letter was *received.* If an offer by mail is not revoked until the letter of revocation actually reaches the offeree, Patrick v. Bowman, 149 U. S. 441 (1893), then also the breach of the contract should not take place in the principal case until the cablegram was delivered to the plaintiff in Buenos Ayres. There is nothing from which an authority in the telegraph company to receive repudiation can be inferred, for they are not the agents of the plaintiff for that purpose.

CONTRACTS—VALIDITY—ASSIGNMENT OF SALARY OF PUBLIC OFFICERS—A partnership agreement between two lawyers to divide equally the salary of the office of prosecuting attorney to which one of them was elected was held contrary to public policy, as being in effect an assignment of the unearned emoluments of a public office. Anderson v. Branstorm, 139 N. W. Rep. 40 (Mich., 1912).

The remuneration which the law provides for the officer is supposed to be essential to support the dignity of the office, to maintain him without resorting to other employments and to supply an inducement for the sedulous performance of his official duties. Bliss v. Lawrence, 58 N. Y. 442 (1874); Field v. Chipley, 79 Ky. 260 (1881); Mulhall v. Quinn, 1 Gray 105 (Mass., 1854); but see, *contra,* State v. Hastings, 15 Wis. 75 (1862), where the court holds that the assignment of salary of a public officer is not against public policy. This case is criticized and disapproved by nearly all the authorities holding a contrary doctrine. In Brackett v. Blake, 48 Mass. 335 (1844), the court did not consider the question from the standpoint of public policy, but based its decision on the ground that the salary to be paid was a possibility coupled with an interest, and as such capable of being assigned.

The following instances are examples of assignments by public officers of salary to become due, which the courts declared void as against public policy. Assignment by sheriff to secure promissory note, Bowery Nat. Bank v. Wilson, 122 N. Y. 478 (1890); assignment by a prosecuting attorney, Holt v. Thurman, 111 Ky. 84 (1901); State *ex rel.* Perkins v. Barnes, 10 S. D. 306 (1897); First Nat. Bank v. State, 68 Neb. 482 (1903); assignment by a retired officer of the United States Army, Schwenk v. Wyckoff, 46 N. J. Eq. 560 (1890); delegation by contract executed by commissioner of immigration, of right to collect salary from state auditor, King v. Hawkins, 2 Ariz. 358 (1888); assignment by clerk in the United States Treasury Department, Bliss v. Lawrence, 58 N. Y. 442 (1874); contract by which a clerk of a chancery court transferred to another all his earnings until a debt should be paid, Field v. Chipley, 79 Ky. 260 (1881). But in Manly v. Bitzer, 9 Ky. 596 (1891), a policeman was allowed to assign his future wages to procure subsistence for his family, the court holding that here were two contrary views of public policy which balanced each other.

CORPORATIONS—STOCKHOLDERS' LIABILITY—FORM OF ACTION—Section 303 of the New York Banking Law (Consolidated Laws, 1909, p. 217) provides that, "The stockholders of every corporation shall be jointly and severally liable for all debts that may be due and owing by it to an amount equal to the par value of their stock in such corporation over and above such stock, to be recovered of the stockholders who were such when the debt was contracted or the loss or damage sustained or of any subsequent stockholder. Any stockholder who may have paid any demand against such corporation, either voluntarily or by compulsion, shall have a right to resort to the rest of the stockholders who are liable to contribution; and the dissolution of the corporation shall not release or affect the liability of any stockholder incurred before dissolution." In Mosler Safe Co. v. Guardian Trust Co., 138 N. Y. Suppl. 298 (1912), it was held that under this statute a creditor could bring a bill in equity against one or more of the stockholders and could compel a discharge, in full, of their statutory liability until his debt was paid. Any stockholder who paid more than his *pro rata* share would have a right of contribution against the others. Furthermore, it was held that such a shareholder could not set off against this liability his claim against the corporation for an advance made for running expenses and not to pay the debts of the corporation.

For a thorough treatment of the nature of the statutory liability of stockholders, of the form of action to be brought by the creditor, and of the stockholder's right of set off, see an article in 48 U .of P. Law Rev. (1900), page 586.

More recent examples of the interpretation and application of various statutes relating to double liability may be found in the following case. In Hazlett v. Woodhead, 27 R. I. 506 (1906), it was held that under the Nebraska Statute, all the creditors and stockholders must be joined in a bill in equity to ascertain assets and liabilities before an action of assumpsit could be brought against a stockholder for his individual liability. On the other hand, under the Wisconsin act, the complaint need not set forth judgment against the corporation or exhaustion of its assets in an action by a creditor against a stockholder. Booth v. Dear, 96 Wis. 516 (1897). Under the North Carolina act a bill in equity by the receiver and several creditors, for themselves and for all the other creditors, against the bank, and several of the stockholders was upheld. Smathers v. Bank, 135 N. C. 410 (1904).

CRIMES—RAPE—CONSENT—In the recent case of Brown v. State, 76 S. E. Rep. 379 (Ga., 1912) it was held that carnal knowledge of a woman while she is asleep would be against her will and without her consent and would constitute the crime of rape.

Rape is the unlawful carnal knowledge of a woman forcibly and against her will. 4 Blackstone Comment. 210; Hooper v. State, 106 Ala. 43 (1894); Croghan v. State, 22 Wis. 445 (1868). If the woman consents, therefore, the intercourse is not against her will and is not rape. Allen v. State, 87 Ala. 107 (1888); People v. Royal, 53 Cal. 62 (1878). Consent is presumed unless the prosecutrix persists to her utmost physical ability. Allen v. State, *supra;* Brown v. State, 127 Wis. 193 (1906); People v. Dohring, 59 N. Y. 383 (1874). On the other hand, however, the consent must be that of a person legally capable of consenting. At common law a female under the age of ten years was incapable of giving consent. 4 Blackstone Comment. 212. At the present day the age at which a woman may give consent is regulated by statute and varies in the different jurisdictions from ten to eighteen years. People v. Chamblin, 149 Mich. 653 (1907); State v. Crawford, 39 Kan. 257 (1888). So also an imbecile who is mentally incapable of understanding the nature of the act can not give consent. People v. Griffin, 117 Cal. 583 (1897); McQuirk v. State, 84 Ala. 437 (1887); and the fact that the defendant did not know the woman was incapable of giving consent makes no difference. People v. Griffin, *supra.* In like manner it is rape where a woman is incapable of giving consent because she is drugged. State v. Green, 2 Ohio Dec. (reprint) 255 (1860); or if intoxicated, so she is unable to resist, Commonwealth v. Burke, 105 Mass. 376 (1870); State v. Hairston, 121 N. C. 579 (1897); or where the penetration occurs while she is asleep. Harvey v. State, 53 Ark. 425 (1890); State v. Green, *supra;* Reg. v. Mayers, 12 Cox C. C. 311 (Eng., 1872). It has been held that she must resist

upon awakening. Pollard v. State, 2 Iowa 567 (1856). There is also authority for the proposition that if defendant has been led to believe prosecutrix would be willing it is no rape. Queen v. Page, 2 Cox C. C. 133 (Eng., 1846); State v. Welch, 191 Mo. 179 (1905).

Where there is consent, even though such consent was obtained by fraud, it is not rape. So it has been held not to be rape, where physician obtained consent by representing intercourse as part of a treatment. Don Moran v. People, 25 Mich. 356 (1872); also by impersonating prosecutrix's husband. State v. Brooks, 76 N. C. 1 (1877). Consent is no defense, however, where it was obtained through threat of bodily harm. Rohke v. State, 168 Ind. 615; State v. Cunningham, 100 Mo. 382 (1889).

CRIMINAL PROCEDURE—SENTENCE—UNCERTAINTY—A defendant, having been convicted of a breach of the liquor laws, was sentenced to a certain fine and imprisonment, provided, however, that if he paid the fine and gave bond in a stipulated sum, conditioned that he would keep the peace and not violate the liquor laws for two years, the imprisonment part of the penalty should be canceled. *Held*—that such a conditional or alternative sentence is void for uncertainty. State v. Sturgis, 85 Atl. Rep. 474 (Maine, 1912).

The sentence, in a criminal case, just as the judgment in a civil suit, must be certain and definite. Picket v. State, 22 Ohio St. 405 (1872). The punishment may not depend on a contingency, nor upon the future exercise of a discretion. Morris v. State, 1 Blackf. 37 (Ind., 1819); Com. v. Patterson, 1 Sus. Leg. Chron. 73 (Pa., 1878). In the case of *re* Strickler, 51 Kan. 700 (1893), the defendant was sentenced to ninety days' imprisonment. But the court provided that "the sentence shall be suspended during such time as the defendant shall keep the peace with all mankind, and desist from all unnecessary use of intoxicating liquor." It was held that such a sentence, depending on a future contingent event, is unauthorized by law and is void. A sentence of imprisonment "to commence after the expiration of former sentences" is too uncertain and indefinite to be enforced. Larney v. City, 34 Ohio St. 599 (1878). Nor can a condition be annexed to a sentence providing for its subsequent remission upon the doing of some thing suggested by the court. State v. Bennett, 4 Dev. & B. 43 (N. Car., 1838). An alternative sentence, in which the defendant must pay a fine or go to jail, has been held bad, State v. Perkins, 82 N. C. 681 (1880); *Ex parte* Martini, 23 Fla. 343 (1887); but the defendant who has been sentenced to pay a fine can be committed to jail until he pays it. Miller v. Camden, 63 N. J. L. 501 at 504 (1899). One line of cases makes a sentence uncertain and, therefore, void, which does not fix the date from which the commencement of the punishment shall date, Kelly v. State, 11 Miss. 518 (1844), but the better opinion and weight of authority seem to be *contra*. People v. King, 28 Cal. 265 (1865); Clifford v. State, 30 Ind. 575 (1869); State v. Smith, 10 Nev. 106 (1875).

DECEIT—RECOMMENDING IRRESPONSIBLE PERSON FOR CREDIT—Where defendant made a false statement as to another's credit recklessly and plaintiff was induced to sell to his injury, it was *held* that defendant was liable in deceit if the statements were false, although at the time he made the statements he did not know whether his statements were true or not. Wells v. Drishell, 149 S. W. Rep. 205 (Texas, 1912).

Where there is a mere expression of opinion as to another's credit, if it is honestly given, an action cannot be maintained. Lord v. Colley, 6 N. H. 99 (1833); Graham v. Hollinger, 46 Pa. 55 (1863); Avery v. Chapman, 62 Iowa 144 (1883). If, however, a statement is made as to another's credit and character, and it is known to be false when made, being made with intent to defraud, he who has been injured thereby can bring an action for deceit on such a statement. Endsley v. Johns, 120 Ill. 469 (1887); Young v. Hall, 4 Ga. 95 (1848); Boyd v. Browne, 6 Pa. 310 (1847).

Upon the question as to how far actual fraudulent intent is necessary to render the one making the statement liable, the courts are not fully in accord. Some courts follow the majority opinion in Haycraft v. Creasy, 2 East 92 (1801), and hold that there is liability in the case of an assertion knowingly false, but not

in the case of a mere false statement of positive knowledge, if the *fact* to which knowledge is claimed to refer was not known to be false. Tryon v. Whitmarsh, 1 Met. 1 (Mass., 1840); Sylvester v. Henrich, 93 Iowa 489 (1895); Terrel v. Bennett, 18 Ga. 404 (1855). The modern tendency, however, is to recognize a positive assertion of knowledge upon any subject, which does not in fact exist, as an element of fraud. Sims v. Eiland, 57 Miss. 607 (1880); Einstein v. Marshall, 58 Ala. 153 (1877); Griswold v. Gebtre, 126 Pa. 353 (1889). See 61 U. of P. Law Review 126.

EVIDENCE—BOOKS OF ORIGINAL ENTRY—Entries either on the books of account of a mercantile company or on stubs of checks are not admissible as evidence of payment of a due bill which it owed. Wells v. Hays, 76 S. E. Rep. 195 (S. C., 1912).

Books of account were originally admitted because a party was unable to testify in his own behalf and no other evidence was available. Lonergan v. Whitehead, 10 Watts 249 (Pa., 1840). But the rule still continued after statutes allowing parties in interest to testify had been passed. Smith v. Smith, 163 N. Y. 168 (1900). The books must be accompanied by a supplementary oath. Van Alstine v. Lemmon, 19 Ill. 393 (1887); Townsend v. Coleman, 18 Tex. 418 (1857); *contra*, Tomlinson v. Borst, 30 Barb. 42 (N. Y., 1859). Unless the party making the entry is dead. R. R. v. Murphy, 60 Ark. 333 (1895); Dickers v. Winters, 169 Pa. 126 (1895); or insane, Holbrook v. Gory, 60 Mass. 215 (1850). In such cases proof of handwriting is sufficient. It is not sufficient where party is merely out of the jurisdiction. Douglass v. Hart, 4 McCord 257 (S. C., 1827).

These books are admissible in the case of a person in any occupation in which it is necessary for books to be kept as a record of daily transactions. Ganahl v. Shaw, 24 Ga. 17 (1859). They must register daily business transactions, Petit v. Teal, 57 Ga. 145 (1876); but the fact that they are kept in ledger form makes no difference. Hoover v. Gehr, 62 Pa. 136 (1869), so long as they are original books of entry. Huston's Estate, 167 Pa. 217 (1895); Greisheimer v. Tannenbaum, 124 N. Y. 650 (1891). Separate sheets of paper have been admitted, Hooper v. Taylor, 39 Me. 224 (1855); *contra*, Jones v. Jones, 21 N. H. 219 (1850). Diaries are not admissible, Riley v. Boehm, 167 Mass. 183 (1896); nor lawyers' dockets, Waldron v. Priest, 96 Me. 36 (1901).

Stubs in check-books are never admissible as between the parties to prove payment. Carter v. Fischer, 127 Ala. 52 (1899); Watts v. Shewell, 31 Ohio 331 (1877); Simons v. Steele, 82 N. Y. App. Div. 202 (1903), affirmed in 177 N. Y. 542 (1904); but see Fulkerson v. Long, 63 Mo. App. 268 (1895). The charges must be specific and lumping them will make them inadmissible. McKnight v. Newel, 207 Pa. 562 (1904); Cargill v. Atwood, 18 R. I. 303 (1893). The entries are admissible to prove articles or goods were delivered or services performed. Lonergan v. Whitehead, *supra;* and only for that, Snow Co. v. Loveman Co., 131 Ala. 221 (1901). They are apparently never admissible to prove money was lent or money paid. Shaffer v. McCracken, 90 Iowa 578 (1894); Priest v. Mercereau, 9 N. J. L. 268 (1829); Hauser v. Leviness, 62 N. J. L. 518 (1898); Smith v. Rentz, 131 N. Y. 169 (1892); Hess' Appeal, 112 Pa. 168 (1886).

EVIDENCE—HEARSAY—PEDIGREE EXCEPTION—In Jarchow v. Grosse, 100 N. E. Rep. 290 (Ill., 1912), the declarations of an intestate as to her pedigree were offered to enable the claimants to reach her estate. It was held that such declarations were admissible without extrinsic proof of relationship and though there were living members of the family who could testify, and the declarations were not ancient.

Declarations as to pedigree are universally held to be an exception to the rule against hearsay. Whitelock v. Baker, 13 Ves. 514 (1807); Cuddy v. Brown, 78 Ill. 415 (1875). And admissible even as to particular facts on which the pedigree is based. Berkeley Peerage Case, 4 Camp. 413 (1811). But only where the issue is one of pedigree. R. v. Erith, 8 East. 539 (1807); Eisenlord v. Clum, 126 N. Y. 552 (1891). Many American courts, however, do not regard this restriction. North Brookfield v. Warren, 16 Gray 171 (Mass., 1860); Hammond v. Noble, 57 Vt. 193 (1884).

The declarant must be dead. Jarchow v. Grosse, *supra*. Absence from the jurisdiction is not sufficient. Ross v. Loomis, 64 Ia. 432 (1884).

The declarations must have been made *ante litem motam*. Berkeley Peerage Case, *supra*. But in some jurisdictions this only goes to the weight of the evidence. Boudereau v. Montgomery, 4 Wash. C. C. 186 (U. S., 1821). And declarations are admissible where declarant had no knowledge of a controversy. Shedden v. Patrick, 2 Sw. & Pr. 170 (1860). Similarly any cause for bias may bar the declarations. Byers v. Wallace, 87 Fed. 503 (1895).

There must be evidence *aliunde* that the declarant is related by blood or marriage to one branch of the family. Monckton v. Atty. Gen., 2 Russ .& M. (1831); Jewell v. Jewell, 42 U. S. 219 (1843); Vowles v. Young, 3 Vesey 140 (1806). Some courts require a relationship to the branch into which the complainant seeks to come. Wise v. Winn, 59 Miss. 590 (1882); *contra*, Sitler v. Gehr, 105 Pa. 577 (1887); Monckton v. Atty. Gen., *supra*. No degree of mere intimacy is sufficient. Johnson v. Lawson, 2 Bing. 86 (1824). *Contra*, Doe v. Auldjo, 5 U. C. Q. B. 175 (1848).

Such evidence is not required where the declarant is the intestate against whose estate a claim is made, Malone v. Adams, 113 Ga. 791 (1901); Wise v. Winn, *supra;* Cuddy v. Brown, *supra;* Young v. State, 36 Ore. 417 (1900)—which would almost go without saying.

The declarations need not be ancient, but are of less weight when recent. Eisenlord v. Clum, *supra*, and, while declarations have been excluded where other members of the family who could testify were living, Hurlburt's Est., 68 Vt. 366 (1896); White v. Strother, 11 Ala. 724 (1847), the general rule is otherwise. Cranford v. Blackburn, 17 Md. 54 (1860).

EVIDENCE—JURORS' RIGHT TO APPLY THEIR OWN EXPERIENCE—In Downing v. Farmers' Mutual Fire Insurance Company, 183 N. W. Rep. 917 (Ia., 1912), an action having been brought on a policy insuring against loss of live stock by lightning, the company introduced expert testimony tending to show that the animal had none of the characteristic marks indicating death by lightning. The jury were instructed that, in determining whether the animal was killed by lightning they could properly consider their own observation and experience, if any, with reference to losses of that nature. This instruction was held to be erroneous.

In general the jury may in modern times act only upon evidence properly laid before them in the course of the trial, but so far as the matter in question is one upon which men in general have a comon fund of experience and knowledge, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. 1 Greenleaf, Evidence, 16th Ed, 1899, Sec. 6 c; IV Wigmore, Evidence, Sec. 2570. In Missouri Railroad Company v. Richards, 8 Kan. 101 (1871), it was held that the jury are always to use the knowledge and experience they are supposed to possess in common with the generality of mankind in making up a verdict, and according to Bowman v. Car & Foundry Company, 226 Mo. 61 (1910), jurors may draw on knowledge that comes from the common experience of mankind to assist them in reaching a conclusion. See also Head v. Hargrave, 105 U. S. 45, 49 (1881); Green v. City of Chicago, 97 Ill. 373 (1881); Huntress v. Boston and Maine Railroad, 34 Atl. Rep. 154 (N. H., 1890); Beveridge v. Lewis, 137 Cal. 619, 628 (1902), and *cf.* Burrows v. Delta Transportation Company, 106 Mich. 582, 599 (1895).

The right of the jury to apply their own knowledge and experience seems limited, however, to those matters with which they are acquainted in common with "the generality of mankind." So in Page v. Alexander, 84 Me. 83 (1891), on the question whether an ox that "drools" is a defective animal, an instruction that the jury may "call into requisition their practical knowledge, if they had any, relating to cattle of this kind," was held erroneous, and in Union Pacific Railroad Company v. Shannon, 33 Kan. 446 (1885), the court said the jury might not use their own judgment in determining in what space a train might be stopped when traveling at a speed of forty-five miles an hour, as this was not within the general knowledge of persons. See also Douglass v. Trask, 77 Me. 35 (1885); Gibson v. Carreker, 91 Ga. 617 (1893); Karren v. City of Detroit, 142 Mich. 331, 337 (1905).

It is, of course, clear that the jury may not use and apply knowledge they may have of facts involved in the particular case, where such facts have not been given in evidence. Waite v. Teeters, 36 Kan. 604 (1887); Citizens Street Railway v. Burke, 98 Tenn. 650, 653 (1897); Chicago R. I. & Pac. Railway Co. v. Cemetery Association, 57 Pac. 252 (Kan., 1899).

EVIDENCE—PHYSICAL EXAMINATION OF THE PLAINTIFF IN ACTIONS FOR PERSONAL INJURIES—Under a statute giving a trial court discretionary power, in a suit for damages for personal injury, to appoint a physician to make a physical examination of the defendant, there is no right to take X-ray photographs, nor to appoint an assistant to use the apparatus unless the injured party consents. State *ex rel.* Carter v. Coll, 59 So. Rep. 789 (Fla., 1912).

Such a statute is not to be extended beyond its terms. Pitt v. Dunlap, 54 Misc. 115 (N. Y., 1907).

In a number of jurisdictions it is held that the court has no power, in the absence of statute, to order a physical examination. May v. N. Pac. R. Co., 32 Mont. 522 (1905); Richardson v. Nelson, 221 Ill. 254 (1906); Railway v. Pendery, 14 Tex. Civ. App. 60 (1896). This position is based on the inviolability of the person. Railway v. Botsford, 141 U. S. 250 (1890). But the right to personal security is waived if the defendant voluntarily exhibits his injury to the jury. Ry. v. Anglin, 99 Tex. 349 (1905).

The great majority of cases, however, hold that the court has power to order the plaintiff to submit to a physical examination, irrespective of statutory authority. Malone v. Railroad, 91 Pac. Rep. 522 (Cal., 1907); Western Glass Co. v. Schoeninger, 94 Pac. Rep. 342 (Colo., 1908); Railroad v. Cloman, 107 Md. 681 (1908); Schroeder v. C. R. I. & C. Co., 47 Ia. 375 (1877); Fillingham v. Railways, 154 Mich. 233 (1908); White v. Railway, 61 Wis. 536 (1884). But only where no serious physical or mental injury is apt to be done. Railway v. Cloman, *supra*. And where it does not endanger the plaintiff's health. Electric Co. v. Allen, 102 Ky. 551 (1898). Nor cause serious discomfort. Railway v. Palmore, 68 Kans. 545 (1904).

The court may refuse an examination where no additional information could be gained. Electric Co. v. Allen, *supra*. Or where there have already been one or more examinations. Fillingham v. Railway, *supra*. Or the physician of the defendant is obnoxious to the plaintiff. Stack v. Railroad, 177 Mass. 155 (1900).

The only way in which a court can compel obedience to its order is to continue the case from time to time until the plaintiff yields. Wanek v. Winona, 78 Minn. 98 (1899).

EVIDENCE—WILLS—EXTRINSIC EVIDENCE TO EXPLAIN AMBIGUITY—A testatrix gave part of her residuary estate to her "niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary." Testatrix' sister Mary in Ireland had two daughters: Annie, who came to the United States and resided in the state of New York; and Mary, who married and continued to live in Ireland. Evidence was admitted to prove that Annie, in fact a resident of New York, and not Mary, who had never left Ireland, was intended. *In re* Donnellan's Estate, 127 Pac. Rep. 166 (Cal., 1912).

There are two classes of latent ambiguities in wills. The first is where there are two or more persons or things exactly measuring up to the description and conditions of the will. Extrinsic evidence is admissible to "enable the court to reject one of the subjects or objects to which the description applies and to determine which of the two the devisor understood to be signified by the description which he used in the will." Doe d. Gord v. Needs, 2 M. & W. 129 (Eng., 1836). It seems to be rather generally agreed both in England and America that such an ambiguity may be explained by extrinsic evidence, including declarations of the testator as to his intention in framing the will. Richardson v. Watson, 4 B. & A. 787, 800 (Eng., 1833); Jones v. Newman, 1 W. Bl. 60 (Eng., 1750); Doe d. Westlake v. Westlake, 4 B. & Ald. 57 (Eng., 1820); *Re* Wolverton's Mortgaged Estates, L. R. 7 Ch. D. 197 (1877); Bodman v. American Tract Society, 9 All. 447 (Mass., 1864); Tilton v. American Bible Society, 60 N. H. 377 (1880).

The other class of cases is where no person or thing exactly answers the declarations and description of the will, but where two or more in part, though imperfectly, do so answer. The principal case is of this class. The admissibility of extrinsic evidence to explain the ambiguity in such a case seems first to have been recognized in Miller v. Travers, 8 Bing. 244 (Eng., 1832). In Doe v. Hiscocks, 5 M. & W. 362, 368 (Eng., 1839), however, it was said that such an ambiguity might not be explained by the testator's declarations of intention. This was approved in Drake v. Drake, 8 H. L. C. 172 (1860); Charter v. Charter, L. R. 7 H. L. 364 (1874); in the Goods of Chappell, 1894 Prob. 98.

In America, the tendency is to admit evidence to explain latent ambiguity in the nature of a misdescription, and to regard the declarations of intention on the part of the testator as admissible along with other extrinsic evidence. It is only in regard to the admissibility of declarations of intention that the American differs from the English rule. Patch v. White, 117 U. S. 210, 217 (1885); Van Nostrand v. Board, 59 N. J. E. 19 (1899); Willard v. Darrah, 168 Mo. 660 (1902); *In re* Welch's Will, 78 Vt. 16 (1904); Taylor v. McCowen, 154 Cal. 798 (1908).

FRAUD—REPRESENTATIONS AS TO FUTURE INTENT—While a promise to do an act in the future cannot be untrue at the time it is made, nevertheless, if it is made in bad faith and with no intention of performing it, it constitutes a fraudulent representation. McLaughlin v. Thomas, 85 Atl. Rep. 370 (Conn., 1912).

The distinction between torts of this character and mere breaches of contract seems to be that "an unfulfilled promise to do a thing is actionable as a contract or not at all; while a false statement of an intention to do a thing may be actionable as a tort." Salmond Torts, p. 449. The first proposition is undisputed law. McConnell v. Pierce, 116 Ill. App. 103 (1904); Hockett v. Ins. Soc., 63 N. Y. S. 847 (1900); Brick Co. v. Shocknett, 108 Wis. 457 (1901); but there is a split of opinion as to whether or not the false statement of an intent is sufficient to support an action.

In the leading case upon this point in England, Bowers, L. J., said that this was enough, declaring that "the state of a man's mind is as much a fact as is the state of his digestion." Fitzmaurice v. Edgington, 29 Ch. D. 459 (1885). This principle has been regarded as correct by the leading text-writers and is supported by the weight of authority. Pollock Torts, page 293; Benedict Torts, page 367; Hart v. Marlton, 104 Wis. 349 (1899); Leather Co. v. Flinn 108 Mich. 91 (1895); Swift v. Rounds, 19 R. I. 527 (1896). On the other hand it has been said that "the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law." Kerr, Fraud, page 51; see also Hartsville Univ. v. Hamilton, 34 Ind. 506 (1870); Dickinson v. Atkins, 100 Ill. App. 411 (1902).

It is submitted that the majority view is the better both in equity and logic; and that the minority view is, as pointed out by Reed, J., in Schrofft v. Trust Co., 73 N. J. L. 57 (1906), based upon a misinterpretation of a few early English decisions.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—In Miller v. Pearce, 85 Atl. Rep. 620 (Vt., 1913), it is held that in an action for alienation of the husband's affections there is no difference in law whether the defendant was the seducer or the seduced, since the loss of *consortium* necessarily results from such alienation, regardless of which party is the seducer, and thus the cause of action is perfected, and the right of recovery established. This accords with Hart v. Knapp, 76 Conn. 135 (1903), but is *contra* to the rule of most jurisdictions.

That a spouse voluntarily gives his affections to another, the latter doing nothing wrongfully to win them, is no ground for action. Waldron v. Waldron, 45 Fed. 315 (1890); Churchill v. Lewis, 17 Abb. N. C. 226 (N. Y., 1886). Plaintiff must show affirmatively that the defendant knowingly and by direct and active interference seduced the husband from his fidelity to his wife. Whitman v. Egbert, 27 N. Y. App. Div. 374 (1898), Waldron v. Waldron, *supra;* Powers v. Sumbler, 83 Kan. 1 (1910); Scott v. O'Brien, 33 Ky. L. Rep. 450 (1008); Warner v. Miller, 17 Abb. N. C. 221 (N. Y., 1886).

The rule of the latter cases seems to be more nearly consistent with the

parallel action of the husband for criminal conversation (although this has the additional ground of loss of services, but which is frequently technical only) where the fact that the wife was the seductress is of no avail as a defense, Smith v. Hockenberry, 146 Mich. 7 (1906); Bigaouette v. Paulet, 134 Mass. 123 (1883); Beden v. Turney, 99 Cal. 649 (1893), but admissible as bearing on the *quantum* of damages. Sieber v. Pettit, 200 Pa. 58 (1901).

INFANTS—RIGHTS OF UNBORN INFANT—A posthumous child is to be considered as existing at the time of its father's death, and is therefore a beneficiary entitled to recover damages in an action under a statute for wrongfully causing the death of the father, though the mother had accepted a settlement for her claim. Herndon v. St. Louis & S. F. R. Co., 127 Pac. Rep. 727 (Okla., 1912).

It is well settled that posthumous children may take as heirs or distributees and are deemed *in esse* from the time of their conception if born alive. Kalfus v. Crawford, 82 Ky. 314 (1884); Waterman v. Hawkins, 15 Pick. 255 (Mass., 1834; McConnel v. Smith, 23 Ill. 611 (1860); Botsford v. O'Conner, 57 Ill. 72 (1870); Bishop's Heirs v. Hampton, 11 Ala. 254 (1847); Bowen v. Hoxie, 137 Mass. 527 (1884); Pearson v. Carlton, 18 S. C. 47 (1882); Marsellis v. Thalhimer, 2 Paige 35 (N. Y., 1830); Harper v. Archer, 4 Lund. & M. 99 (Miss., 1845); Laird's Ap., 85 Pa. 339 (1877). But if the child is born dead or so prematurely as to be incapable of living, it is considered as never having been born or conceived. Marsellis v. Thalhimer, *supra;* Martin's Est. 3 Pa. Co. Ct. 212 (1885).

A posthumous child takes directly from the parent at birth, his estate meanwhile remaining in abeyance. McConnel v. Smith, 23 Ill. 611 (1860); Lansberry v. McElroy, 6 Bush 440 (Ky., 1869). Accordingly it cannot be divested of an inheritance unless by due process of law, to which it is made a party. Botsford v. O'Conner, 57 Ill. 72 (1870); Giles v. Solomon, 10 Abb. Pr. N. S. 97, note (N. Y., 1867); Deal v. Sexton, 144 N. C. 157 (1907). *Contra*, Knotts v. Stearns, 91 U. S. 638 (1875).

A like result has been reached in applying a similar statute in Texas. T. & P. Ry. Co. v. Robertson, 82 Tex. 657 (1891); Nelson v. G. etc. Ry. 78 Tex. 621 (1890); G. etc. Ry. v. Contreras, 31 Tex. Civ. App. 489 (1903). But the California courts have refused to consider a child *en ventre sa mere* as an heir, and have, therefore, refused to allow recovery. Daubert v. Western Meat Co., 139 Cal. 480 (1903).

INNKEEPERS—LOSS OF PROPERTY BY GUEST—In a suit by a guest against an innkeeper for damages for the loss of ordinary wearing apparel and personal effects left by him in his room, proof that he delivered the key to the innkeeper makes out a *prima facie* case and it is not necessary for him to show fault or negligence on the part of the innkeeper. Palace Hotel Co. v. Medart, 100 N. E. Rep. 317 (Ohio, 1912).

There is a conflict as to whether the innkeeper is liable as as insurer or not. In England he is held as an insurer, Butler v. Quiller, 17 T. L. R. 159 (1900); Miller v. Federal Coffee Palace, 15 Victorian Law Rep. 30 (1889). Chancellor Kent, in his commentaries, 2 Kent Comm. 594, followed the English rule and is followed in the majority of jurisdictions. Malee v. Brown, 1 Cal. 221 (1850); Lucia v. Omel. 53 N. Y. App. Div. 641 (1900); Gast v. Gooding, 10 Ohio Dec. 315 (1849); Quinton v. Courtney, 2 N. Car. (1 Hayn.) 40 (1794); Turner v. Whitaker, 9 Pa. Super. Ct. 83 (1898); Sibley v. Aldrich, 33 N. H. 553 (1856); Crapo v. Rockwell, 94 N. Y. Suppl. 1122 (1905).

But Justice Story, in his "Bailment," Sec. 472, said the rule was that innkeepers were not insurers like common carriers, but were liable only in case of negligence or fault. This view has been followed in some jurisdictions. Johnson v. Richardson, 17 Ill. 302 (1855); Woodworth v. Morse, 18 La. Am. 156 (1866); Howe Machine Co. v. Pease, 49 Vt. 477 (1877); Baker v. Dessauer, 49 Ind. 28 (1874); Johnson v. Chadbourne Finance Co., 94 N. W. Rep. 874 (Minn., 1903); Cutler v. Bonney, 30 Mich. 259 (1874).

Yet whatever view is adopted, it is well settled that upon loss or injury to the goods being shown, the innkeeper is *prima facie* liable and the burden is upon him to prove such facts as will exonerate him. Lassier v. Clark, 37 Ga. 242 (1868).

INJUNCTIONS—ENFORCEMENT OF CONTRACT FOR PERSONAL SERVICES—In Rosenstein v. Zentz, 85 Atl. Rep. 675 (Md., 1912), it was held that, though a contract by a piano salesman and collector contained a negative provision that he would not be connected with any other than the complainants in a similar business during the time stated, no injunction will issue to restrain him from violating such provision, where it does not appear that the services to be performed were in any sense extraordinary, or that he had any peculiar fitness.

This is in accord with the general rule that a court of equity will not enforce specifically a contract to render personal services requiring no special skill or qualification, even though he has expressly agreed to work for no one else or to devote all his time to the service of the complainant. Sternberg v. O'Brien, 48 N. J. Eq. 370 (1890); Kessler v. Chappelle, 73 N. Y. App. Div. 447 (1902); Scott Fertilizer Co. v. Wagner, 19 Lanc. L. Rev. 345 (Pa., 1902); Cochrane v. Exchange Tel. Co., 65 L. J. Ch. 334 (1895).

But where one contracts to render special, unique, or extraordinary personal services requiring special merit or qualification, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, although equity cannot specifically enforce the affirmative part of the contract, yet it will exert its preventive powers and enjoin the employe from working for others or doing positive acts in violation of the contract. When the employe expressly agrees not to work for any other, the breach thereof may be enjoined. California Bank v. Fresno Canal Co., 53 Cal. 201 (1878); Western Union Tel. Co. v. Union Pac. R. Co., 3 Fed. 423 (1880); Rogers Mfg. Co. v. Rogers, 58 Conn. 356 (1890); Metropolitan Exhibition Co. v. Ward, 9 N. Y. Suppl. 779 (1890); Lumley v. Wagner, 1 De G. M. & G. 604 (1852).

Where there is no express negative agreement, but the contract is such that its due performance must necessarily prevent any service for others, the weight of authority is to the effect that a negative will be implied and will be enforced by injunction. Montague v. Flockton, L. R. 16 Eq. 189 (1873); Daly v. Smith, 49 How. Pr. 150 (N. Y., 1874); Cort v. Lassard, 18 Oreg. 221 (1889); Myers v. Steel Mach. Co., 67 N. J. Eq. 300 (1904).

Practically the contrary has been held in English cases requiring the implication to be very clear and definite. Whitewood Chem. Co. v. Hardman, (1891) 2 Ch. 416; Mutual etc., Assoc. v. N. Y. L. Ins. Co., 75 L. T. Rep. N. S. 528 (1896).

LIBEL—PRIVILEGE—PROCURING EVIDENCE OF—A person who instigates or procures a libelous communication to be published against himself, for the purpose of predicating a suit for damages upon it, cannot recover in such an action. But if he instigates or sets on foot inquiries for the purpose of ascertaining the source of evil reports, in order that they may be contradicted, or for any other proper purpose, and not for the purpose of starting an action for damages in his own behalf, he is not estopped thereby from maintaining such an action. Richardson v. Gunby, 127 Pac. Rep. 533 (Kansas, 1912). In this case one M applied to the defendant for information concerning plaintiff's financial and business reputation as though he were a prospective investor, and the defendant gave what he believed to be an honest opinion. Upon being sued the defendant pleaded privilege, besides setting up the defense that the plaintiff had procured such information in order to found a cause of action.

Where one is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bona fide* and without malice does tell them, it is a privileged communication. Davis v. Sneed, L. R. S. Q. B. 608 (1870); Bromage v. Prosser, 4 B. & C. 247 (1825); Somerville v. Hawkins, 10 C. & B. 583 (1851); Sheftall v. Central R. R., 123 Ga. 589 (1905); McGraw v. Hamilton, 184 Pa. 108 (1898); Townsend (4th Ed.) on Slander and Libel, § 209. Whether such communication is to be deemed privileged, that is whether or not the situation of the party making it and the circumstances attending it were such as to rebut the legal inference of malice, is a question of law to be determined by the court. Coxhead v. Richards, 2 C. & B. 569 (1846); Taylor v. Hawkins, 16 A. & E. (N. S.) 308 (1851); Gassett v. Gilbert, 6 Gray 94 (Mass., 1856); Nech v. Hope, 111 Pa. 148 (1886). And it lies upon plaintiff to show that defendant was actuated by malicious motives, which is a question

for the jury. Warr v. Jolly, 6 C. & P. 497 (1834); Hamilton v. Eno, 81 N. Y. 116 (1880); Fowles v. Bowen, 30 N. Y. 20 (1864); Moore v. Leader Publishing Co., 8 Super. Ct. 152 (Pa., 1898). This is so even where the circumstances of the publication are conditionally privileged. Dial v. Holter, 6 Ohio 228 (1856), as where upon application a master gives the character of a discharged servant. Weatherston v. Hawkins, 99 Eng. Rep. 1001 (1786); Rogers v. Clifton, 3 B. & P. 591 (1803); King v. Waring, 5 Esp. 13 (1803); Patterson v. Jones, 8 B. & C. 578 (1828).

Where the plaintiff has been instrumental in procuring the publication to be made in order to found an action the decisions seem to bar such an action on grounds of estoppel. Schoepflin v. Coffey, 162 N. Y. 12 (1900); Kansas City R. R. v. DeLancey, 102 S. W. Rep. 289 (1899); Howland v. Blake Co., 156 Mass. (1892); Sutton v. Smith, 13 Mo. 120 (1850); Pichard v. Lears, 6 A. & E. 474 (1859). Text-book authorities look at it from the standpoint of the defendant and deem such communications privileged. Newell on Libel and Slander, § 114; Folkard (7th Ed.) on Libel and Slander, page 11.

MASTER AND SERVANT—ASSUMPTION OF RISK—SIMPLE CONTRIVANCE—A stool in a shoe store, used to stand upon to reach boxes, was out of repair, throwing an employe to the floor and injuring him. It was held not to be such a simple contrivance as to raise a presumption of assumption of risk by the employe. Stimson v. Whitmore, 85 Atl. Rep. 113 (R. I., 1912). It was left to the jury to find the assumption of risk.

It is a well settled rule of law that the master must use ordinary care to inspect and keep appliances and tools in a reasonably safe condition for the use of his servants. It is the master's duty to inspect and repair the apparatus at reasonable intervals and with ordinary prudence. McDonald v. Standard Oil Co., 69 N. J. L. 445 (1903). That reasonable care on part of master involves proper inspection is stated in Byrne v. Eastmans Co., 163 N. Y. 463 (1900). Where, however, the defect is obvious, the servant is held to have notice; and assumption of risk is presumed, McGrath v. D. L. & W. R. R., 68 N. J. L. 425 (1902); but the servant is chargeable only with such defects as are patent and obvious and is not deemed to have notice of defects and insufficiencies that can be ascertained only by investigation and inspection. Wrisley Co. v. Burke, 203 Ill. 250 (1903); Armour v. Brazean, 191 Ill. 117 (1901); Green v. Sansom, 41 Fla. 94 (1899); Murphy v. Marston Coal Co., 183 Mass. 385 (1903).

In some instances, however, the courts have made a distinction in regard to what they call the small and common tools in every day use, and have held that the master's duty of periodical inspection does not extend to the common tools in every day use, of the fitness of which for use the servants who use them may reasonably be supposed to be better judges than the master, or any person whom he can employ for the purpose of inspection. Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275 (1898); Miller v. Erie R. R., 21 App. Div. 45 (N. Y., 1897); Garnett v. Phoenix Bridge Co., 98 Fed. 192 (1899); Sheridan v. Gorham Mfg. Co., 28 R. I. 256 (1907). This is the theory upon which the defendants rely in the principal case; it has been applied in the case of ladders, Sheridan v. Gorham Mfg. Co., *supra*; Dessecker v. Phoenix Mills Co., 98 Minn. 439 (1906), Jenney E. L. & P. Co. v. Murphy, 115 Ind. 566 (1888); so also in the case of chisels, H. & T. C. R. R. v. Conrad, 62 Tex. 627 (1884) and wrenches, O'Brien v. M. K. & T. R. R., 36 Tex. Civ. App. 528 (1904), Garnett v. Phoenix Bridge Co., 98 Fed. 192 (1899); and crowbars, Clements v. A. G. S. R. Co., 127 Ala. 166 (1899); and push poles used in shifting cars, Miller v. Erie R. R., 21 App. Div. 45 (N. Y., 1897).

In all the preceding instances, however, the courts have held that the mere fact that the tool is a simple one will not raise a presumption of assumption of risk, but have left the finding of that fact to the jury, unless the case is so absolutely plain that but one conclusion could properly be drawn.

PARTIES—JOINT AND SEVERAL TORTS—SLANDER—Slander, unlike libel, is not susceptible of joint commission by two or more persons and hence a petition joining two or more defendants for slander was held demurrable for misjoinder. Smith v. Agee, 59 So. Rep. 647 (Ala., 1912).

There seem to be comparatively few cases on this point. This case follows the general common law rule that since utterance of words is a purely individual act, he alone can be liable who spoke the words. If two or more utter the slander at the same time the utterance of each is individual and subject to separate proceedings, but a joint action will not lie. Forsyth v. Edmiston, 5 Duer, 653 (1856); Gattis v. Kilgo, 125 N. C. 133 (1899); Glass v. Stewart, 10 S. & R. 222 (Pa., 1823). The same is true where words are spoken by both husband and wife. Carvill v. Cochran, 1 Phila. 399 (1852); Blake v. Smith, 19 R. I. 476 (1897). Though the husband must be joined in an action for slander committed by the wife alone. Baker v. Young, 44 Ill. 42 (1867). But when the slander is uttered in furtherance of a joint conspiracy, the conspirators become joint tort-feasors. Green v. Davies, 83 N. Y. App. Div. 216 (1903); Forsyth v. Edmiston, *supra*.

It is equally well settled that when the publication of a libel is the joint act of two or more persons they may be sued jointly. Miller v. Butler, 6 Cush. 71 (Mass., 1850); Forsyth v. Edmiston, *supra;* Atlantic Glass Co. v. Paulk, 83 Ga. 404 (1887); Harris v. Huntington, 2 Tyler, 147 (Vt., 1802); Patten v. Gurney, 17 Mass. 182 (1821); Thomas v. Rumsey, 6 Johns, 653 (N. Y., 1810); or separately, Munson v. Lathrop, 96 Wis. 193 (1881); Ludgwig v. Cramer, 53 Wis. 193 (1881).

It is generally conceded that a corporation may be liable for slander, but to be rendered so by the words of an agent, they must have been authorized or ratified. Singer Mfg. Co. v. Taylor, 150 Ala. 574 (1907); Sawyer v. Norfolk & S. R. Co., 142 N. C. 100 (1906); International Text Book Co. v. Heartt, 136 Fed. 132 (1905); Behre v. Nat. Cash Register Co., 100 Ga. 213 (1896). Though in Yazoo v. Miss. Val. R. R., 43 So. Rep. 471 (Miss., 1907), it was held enough that the words were spoken by the agent within the scope of his employment. *Contra*, Childs v. Bank of Mo., 17 Mo. 213 (1852); Eichner v. Bowery Bank, 24 App. Div. 63 (N. Y., 1877); where it was held that a corporation cannot in any event be liable for the words of its agent.

PLEADING—NON-JOINDER OF PARTIES DEFENDANT—In Rutter v. McLaughlin, 100 N. E. Rep. 509 (Ill., 1913), it was held that where, in an action of *assumpsit* for the price of coal, the defendant pleaded the general issue, his evidence that a portion of the coal had been sold and delivered to the firm of which he was a member, and not to him individually, was properly excluded; non-joinder of parties defendant being a defense, which may be presented only by a plea in abatement, unless the defect appears from the plaintiff's own pleading.

This is in accord with the general rule in this country, that the objection of non-joinder of parties defendant, not disclosed by the declaration, can be raised only by a plea in abatement, or in jurisdictions in which pleas in abatement, as distinguished from pleas in bar, are abolished, by an affirmative answer. Ross v. Allen, 67 Ill. 317 (1873); Collins v. Smith, 78 Pa. 423 (1875); Metcalf v. Williams, 104 U. S. 93 (1881); Wilson v. McCormick, 86 Va. 995 (1890); Chapman v. Forbes, 123 N. Y. 532 (1890); Gray v. Sharp, 62 N. J. L. 102 (1898); Townsend v. Wheatland, 186 Mass. 343 (1905).

Similarly, the failure to set up by answer the non-joinder of persons as defendants in suits in equity, is a waiver of the objection. Bevier v. Dillingham, 18 Wis. 529 (1864); Smith v. Dorn, 96 Cal. 73 (1892); Lawrence v. Congreg. Church, 164 N. Y. 115 (1900).

A plea in abatement or an affirmative answer for the non-joinder of parties defendant must allege that the persons not joined are living and resident within the jurisdiction of the court. Ascue v. Hollingsworth, Cro. Eliz. 544; Roberts v. McLean, 16 Vt. 608 (1844); Belden v. Curtis, 48 Conn. 32 (1880); Goodhue v. Luce, 82 Me. 222 (1889); Door Co. v. Keogh, 77 Wis. 24 (1890); Boseker v. Chamberlain, 160 Ind. 114 (1903).

QUASI-CONTRACTS—MONEY HAD AND RECEIVED—PAYMENT BY MISTAKE—A debtor owing sixty-seven cents gave to his bank a check payable to his creditor, the defendant bank. The amount in writing was sixty-seven dollars and in figures it was written $ .67. The jury found that in the clearance between the banks the defendant bank received sixty seven dollars on this check. It was held

that the debtor was entitled to recover the excess though the particular money received by the defendant bank had never been in the possession of the debtor. Wagener v. U. S. Nat. Bank of La Grande, 127 Pacific (Ore.) 778 (1912).

Money paid under a mistake of fact may generally be recovered in an action for money had and received. For authorities and discussion of the substantive right, see a Recent Case entitled "Quasi Contracts, Recovery of Money Paid by Mistake," 61 U. of P. Law Review 342.

"To maintain an action for money paid under mistake, it is not sufficient for a plaintiff to prove that he has conferred a benefit upon the defendant under mistake. It must appear that the defendant has actually received money, or that which the parties treated as money." Keener, Quasi-Contracts, p. 139. The principal case is in accord with the authorities. Dechen v. Dechen, 59 N. Y. App. Div. 166 (1901). That the defendant has received a credit to which he was not entitled is generally held not sufficient to sustain the action, Lee v. Merrett, 8 Q. B. 820; 55 E. C. L. 820 (1846); Brundage v. Village of Port Chester, 102 N. Y. 494 (1886), apparently *contra* to Tinslar v. May, 8 Wend. 561 (1832). In Hendricks v. Goodrich, 15 Wis. 679 (1862), it was held that the action could be maintained in a case where a valuable horse was by mistake given in payment of a debt because there was nothing to indicate that the parties treated the horse as money. The giving of negotiable paper is generally regarded as a payment of money. Gooding v. Morgan, 37 Me. 419 (1854).

STATUTES—VALIDITY—UNCONSTITUTIONAL PROVISIONS—When a part of a statute is unconstitutional and is vital to the whole, or the other provisions are so dependent on it or so connected with it that it may be presumed that the legislature would not have passed one without the other, the whole is void. Booth & Flinn v. Miller, 85 Atl. Rep. 457 (Pa., 1912).

A statute may be in part valid and in part invalid. *Ex parte* Pollard, 40 Ala. 77 (1866); Rood v. McCarger, 49 Cal. 117 (1874); State v. Copeland, 3 R. I. 33 (1854); State v. Wheeler, 25 Conn. 290 (1856); Chunk v. McGee, 813 Pa., 433 (1876). It may take effect as to the part which is constitutional. Mills v. Sargent, 36 Cal. 379 (1868); Kennedy v. R. R., 22 Wis. 581 (1868); Santo v. State, 2 Clarke, 165 (Iowa, 1855). But, although a statute may be perfectly valid in its general and proper application, yet it can be held void in particular applications of its provisions. Wilkins v. State, 113 Ind. 514 (1887).

In a statute which contains invalid or unconstitutional provisions, if the valid and invalid provisions are capable of separation, only the latter are to be disregarded, and the former are allowed to stand. Albany v. Stanley, 105 U. S. 305 (1881); Lawton v. Steele, 119 N. Y. 226 (1890); Unity v. Burrage, 103 U. S. 447 (1880); Baldwin v. Franks, 120 U. S. 678 (1886).

It is only when different clauses of an act are so dependent upon each other that it is evident that the Legislature would not have enacted one without the other that the whole act will fall with the invalidity of one clause. Little Rock Co. v. Worthen, 120 U. S. 97 (1886); Quinlon v. Rogers, 12 Mich. 168 (1863); *ex parte* Wells, 21 Fla. 280 (1885); Burkholtz v. State, 16 Lea, 71 (Tenn., 1885). Or where they are so mutually dependant on and connected with each other as to warrant the belief that the Legislature intended them as a whole, the unobjectionable provisions will fall with the others. State v. Pond, 93 Mo. 606 (1887); O'Brien v. Krenz, 36 Minn. 136 (1886). Or where only one object is aimed at and all the provisions are contributory to it. Darby v. Wilmington, 76 N. C. 133 (1877). Or where the void provisions were evidently designed as inducements to the valid provisions. Slanson v. Racine, 13 Wis. 398 (1861). Or where the void provisions enter entirely into the scope and design of the law and it is impossible to maintain it without the obnoxious provisions. Reed v. Omnibus Co., 33 Cal. 212 (1867).

Where, by rejecting the illegal exceptions contained in a statute, it is made to enact what the Legislature never meant to enact, the whole statute must be rejected. Com. v. Clapp, 5 Gray, 97 (Mass., 1855); Spraigue v. Thompson, 118 U. S. 90 (1885).

TORTS—AUTOMOBILES—PARENT'S LIABILITY FOR TORT OF A SON—In Parker v. Wilson, 60 So. Rep. 150 (Ala., 1912), a boy, driving his father's automobile,

negligently ran down and killed the plaintiff's intestate. He had been allowed to use the machine at his pleasure, and at the time was out with friends. It was held that the father could not be charged, as this was a mere permissive user for the son's own purposes and not in his father's business. *Accord:* Jordan v. Smith, 211 Mass. 269 (1912); Maher v. Benedict, 123 App. Div. 579 (N. Y., 1908) *Contra*, Daily v. Maxwell, 133 S. W. Rep. 351 (Kans., 1911). The facts in these cases are identical with those in the principal case.

Parker v. Wilson seems to express the better rule, being in accord with the doctrine of the common law that no liability for tort arises from the relation of parent and child. Smith v. Jordan, *supra*. Where other members of the family are in the car, liability of a parent may be founded on an agency in the "business" of the parent. Stowe v. Morris, 147 Ky. 386 (1912). Similarly liability may be based on negligence, in allowing an incompetent to have the car. Daily v. Maxwell, *supra*. And, in some courts, upon the theory that an automobile is dangerous *per se*, like dynamite or wild animals. Ingraham v. Stockamore, 63 Misc. 114 (N. Y., 1909). This is not the general view. Steffen v. McNaughton, 142 Wis. 49 (1910).The agency theory has been invoked as a basis for liability of the parent, where the automobile was used, with permission by the child for his own pleasure solely. Daily v. Maxwell, *supra*. Doran v. Thompson, 74 N. J. L. 445 (1907), taking the opposite view, represents the weight of authority.

For further cases on a parent's liability for the torts of his children, see 60 U. of Pa. Law Review, 682 (1911–12).

TORTS—NEGLIGENCE—CARE REQUIRED OF PEDESTRIANS IN CROSSING STREETS—A pedestrian is not guilty of negligence *per se* in failing to look up and down a busy street in a large city for approaching vehicles before he attempts to cross it; and whether or not his failure to do so is contributory negligence is a question for the jury. Adler v. Martin, 59 South Rep. 597 (Ala., 1913).

The decision is based upon the fact that what is or is not due care in such cases depends upon so many different circumstances that the question should not be left to judicial determination, but submitted to the jury. This is in accord with the unanimous opinion expressed in the earlier decisions and which, until recently, has not even been questioned, declaring that the rule regarding looking and listening, before crossing a railroad, has absolutely no application to a person crossing a street. Moebus v. Herrman, 108 N. Y. 349 (1888); Harris v. Commercial Ice Co., 153 Pa. 278 (1893); Simons v. Gaynor, 89 Md. 165 (1883); Shapleigh v. Wyman, 134 Mass. 118 (1883).

In these cases it is clearly the opinion of the courts that the question of negligence is the same whether a person crossing the street was injured while crossing between blocks or at the regular cross-walks. This principle is severely criticized in Thomp. Neg. Sec. 1301, on the ground that between street corners, the driver has not the same reason to anticipate the presence of pedestrians as at regular crossings and hence, practically speaking, should not be required to maintain the same degree of vigilance. The tendency of the later cases appears to accord with this view and to impose a higher degree of care upon pedestrains crossing the street between crossings. Baker v. Close, 204 N. Y. 92 (1912); Kauffman v. Nelson, 225 Pa. 174 (1909); Arseneau v. Sweet, 106 Minn. 257 (1909); McCorniel v. Hesser, 77 N. J. L. (1908). In the Pennsylvania and New Jersey cases just cited and in 2 Elliott on Roads v. Streets, sec. 1123, (3rd Ed.), there seems to be laid down the principle that, while the question of reasonable care in such cases is ordinarily for the jury, nevertheless, where the plaintiff has stepped into a street and remained oblivious of his surroundings or, failing to look at all, has rushed blindly into danger, the court may decide, as a matter of law, that recovery is barred by contributory negligence.

TORTS—RUNAWAY HORSES—NEGLIGENCE *Per Se*—When a team is found running away unattended, upon a public throughfare, and in its course injures a person without his fault, a *prima facie* case of negligence is made out and it rests with the owner of the team to show that such negligence was not due to any lack of care or duty on his or his agent's part. Breidenback v. McCormick Co. 128 Pac.Rep. 423 (Cal., 1912).

It is pretty well recognized that the leaving of horses unhitched in a public

street is negligence *per se*. Hoboken Land Co. v. Sally, 48 N. J. L. 604(1886); Turner v. Page, 186 Mass. 600, (1904); Zambelli v. Johnson & Sons Co., 115 La. 483 (1905); Pierce v. Conners, 20 Colo. 178 (1894); Kelly v. Adelman, 76 N. Y. Supp. 574 (1902); Henry v. Klopfer, 147 Pa. 178 (1892); Stevenson v. U. S. Express Co., 221 Pa., 59 (1908); though if left in charge of a competent person, no presumption of negligence arises. Illidge v. Goodwin, 5 C. & P. 190 (1831); Doyle v. Omnibus Co., 105 Mich. 195 (1895); Dexter v. McCready, 54 Conn. 171 (1886).

The application of the doctrine of *res ipsa loquitur* under circumstances as in the principal case varies according to the jurisdiction. Snee v. Duskie, 6 Session Cases, 42 (5th Series, 1903); Cosulich v. Oil Co., 122 N. Y. 118 (1890); Kokall v. Lumber Co., 77 N. J. L. 169 (1908); Gorsuch v. Swan, 109 Tenn. 36 (1902); Strup v. Edens, 22 Wis. 432 (1869); Rumsey v. Nelson, 58 Vt. 590 (1886); Maus v. Broderick, 51 La. Ann. 1153 (1899); Boyd v. Portland Elec. Co., 41 Ore. 336 (1902). Courts which do not recognize this principle place the burden upon the plaintiff to prove that the defendant was negligent of some precaution or care, which caused the horse to run away. Gibbons v. Pepper, 2 Salk. 637 (1692); Boss v. Litton, 5 C. & P. 407 (1832); Cotton v. Wood, 8 C. B. (N. S.) 568 (1860); Swafford v. Rosenbloom, 102 Ill. App. 578 (1902); Brelton v. Frink, 51 Conn. 342 (1883); Broult v. Hanson, 158 Mass. 17 (1893); Holmes v. Mather, L. R., 10 Eq. 261 (1875); Gottwald v. Bernheimer, 6 Daly 212 (N. Y., 1875); though the evidence in most instances tended to show there was an attendant nearby, which fact negatived the presumption of negligence. Davis v. Kallfely, 22 Misc. 602 (N. Y., 1898); Rowe v. Frech, 134 Cal. 573 (1901).

The Pennsylvania courts seem to make an exception in the cases where horses are running unattended upon the streets, for in such instances they apply the *Res ipsa loquitur* doctrine. Hummell v. Wester, Brightly's Rep. 133 (1849); Gannon v. Wilson, 1 Salder. 422 (1880); but not in any other circumstances. Zahneser v. Penna. Torpedo Co., 190 Pa. 350 (1899); Bauman v. Best Mfg. Co. 234 Pa. 416 (1912).